

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 30, 2004

IN RE:

APPLICATION OF VOLUNTEER
FIRST SERVICES, INC. FOR A
CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO
PROVIDE COMPETING
TELECOMMUNICATIONS SERVICES
WITHIN THE STATE OF TENNESSEE

DOCKET NO.
03-00607

INITIAL ORDER APPROVING APPLICATION FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority" or "TRA") at a hearing held on March 15, 2004 for the purpose of considering the *Application for Certificate of Public Convenience and Necessity to Provide Competing Telecommunications Services* (the "*Application*") of Volunteer First Services, Inc. ("VFS"). The *Application* requests the Authority to grant a certificate of public convenience and necessity ("CCN") to provide competing local telecommunications services within the State of Tennessee.

I. Travel of the Case

VFS filed its *Application* on November 19, 2003. The *Application* states that ownership of VFS is divided evenly between Volunteer Energy Cooperative ("VEC") and Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand"). Ben Lomand is an incumbent local exchange carrier and a telephone cooperative as defined by Tenn. Code Ann. § 65-29-102. Ben Lomand operates in the Counties of White, Warren, Van Buren, Grundy as well as portions of Franklin,

Coffee and Bedford Counties. The *Application* sets forth VFS' representations regarding its financial, managerial and technical qualifications as a provider of competing local and interexchange telecommunications services and requests that the Authority authorize VFS to provide the same in the State of Tennessee. The *Application* describes VFS' proposed service area as the entire State of Tennessee but states that VFS intends initially to serve customers in the Crossville area.¹ The *Application* describes the types of services to be provided by VFS as including local and long distance voice services and data services.² The *Application* states that VFS proposes to provide these services using leased facilities and/or VFS' own facilities.³ The *Application* requests additional authority to provide all forms of facilities-based and resold local exchange and interexchange telecommunications services. The *Application* states VFS' intent to provide access to, and support for, the Tennessee Relay Center, access to Lifeline and Link-up services, access to basic intraLATA and interLATA message toll calling operator services, directory assistance, directory listings, 911 and E911 emergency services and a free blocking service for 900 and 976-type calls.⁴ The *Application* states VFS' intention to receive written customer inquiries and to establish a toll-free number for customer inquiries to be printed on customers' monthly bills.⁵ A Small and Minority-Owned Telecommunications Business Participation Plan, a statement regarding numbering issues, and an IntraLATA Toll Dialing Parity Plan are attached to the *Application*.⁶ The *Application* states VFS' intention to provide equal access to its network to authorized carriers, to abide by all applicable state statutes and by orders, rules and regulations of the Authority, and to file and maintain tariffs in the manner

¹ *Application*, p 5 (November 19, 2003)

² *Id*

³ *Id*

⁴ *Id*, pp 5-6

⁵ *Id*, p 6

⁶ *Id*

prescribed by the TRA.⁷ The *Application* states VFS' intention to obtain all necessary franchises, permits or licenses and its intent to maintain its books and records according to Generally Accepted Accounting Principles.⁸ The *Application* affirms that VFS' owners, VEC and Ben Lomand, will not provide subsidies to VFS.⁹

On December 10, 2003 Authority Staff filed a data request to which VFS filed a response on December 17, 2003. In its data request the Authority Staff noted that VFS has indicated in its *Application* that it plans to contract with Ben Lomand and VEC for employees to provide sales, operations, engineering and customer services and asked VFS to describe the steps that will be taken by VFS and its parent entities to avoid cross subsidization.¹⁰ In its response, VFS replied that it will allocate common costs and/or will compensate Ben Lomand and VEC at market rates and attached a cost allocation manual for Authority Staff's review.¹¹ VFS stated further in its response that it will obtain an annual independent audit report on its financial statements and will, at the TRA's request, provide an independent audit of the cost allocation plan as well as its other books and records.¹²

On January 13, 2004 Citizens Telecommunications Company ("Citizens") filed the *Petition to Intervene of Citizens Telecommunications Company of Tennessee, LLC* ("*Intervention*"). In its *Intervention* Citizens noted that VFS' *Application* states VFS' intent to compete with Citizens in the Crossville area and that 50% of the stock of VFS is owned by Ben Lomand.¹³ Citizens also noted in its *Intervention* that Ben Lomand owns Ben Lomand Communications, Inc. ("BLC"), a competing local telephone exchange company operating and competing with Citizens in Warren

⁷ *Application*, pp 6-7 (November 19, 2003).

⁸ *Id.*, p 7

⁹ *Id.*

¹⁰ *Data Request*, p 1 (December 10, 2003).

¹¹ *Responses to Data Request from the TRA Staff*, p 2 (December 17, 2003)

¹² *Id.*

¹³ *Intervention*, p. 2 (January 13, 2003)

County and White County.¹⁴

On January 14, 2004 VFS filed information supplementing its *Application* in which it stated its intent to comply with Tenn. Code Ann. § 65-21-114 regarding county-wide calling and explained the procedures that will be implemented to prevent customers from being charged long-distance rates for in-county calls.

At a regularly-scheduled Authority Conference held on February 9, 2004, Director Pat Miller, Director Sara Kyle, and Director Ron Jones, the voting panel assigned to this docket, voted unanimously to grant intervention to Citizens and to appoint the Authority's General Counsel or his designee to act as the Hearing Officer in this matter.¹⁵ In its Order, the voting panel directed the Hearing Officer to render an initial decision on the merits of the *Application* including findings of fact and conclusions of law as necessary.¹⁶

The Hearing Officer issued a Notice of Hearing on February 27, 2004 and set this matter for hearing. The Hearing of this docket took place on March 15, 2004. Counsel for VFS, Ms. D. Billye Sanders, Esq. of Waller, Lansden, Dortch and Davis appeared at the Hearing on behalf of VFS. Counsel for Citizens, Mr. Guilford Thornton, Jr. of Stokes, Bartholomew, Evans and Petree appeared at the Hearing on behalf of Citizens. Mr. Kent Rosenbury appeared as a witness on behalf of VFS and was made available for questioning by Authority Staff and for cross-examination by counsel for Citizens. Counsel for Citizens declined to cross-examine the witness and instead requested, and received, an opportunity to make a statement at the close of the Hearing.¹⁷ During the Hearing Counsel for Citizens stated:

Citizens has sought interconnection with Ben Lomand to compete in the territory

¹⁴ *Intervention*, p. 2 (January 13, 2003)

¹⁵ *Order Convening a Contested Case Proceeding, Granting Intervention and Appointing a Hearing Officer*, p. 2 (March 4, 2004)

¹⁶ *Id.*, p. 1

¹⁷ Transcript of Proceedings, p. 6 (March 15, 2004).

historically served by the co-op. The co-op in those negotiations has only agreed to an interconnection agreement under the conditions that a third party court or agency must rule that the co-op must allow competition in its territory before that competition can, in fact, occur. It's the position of Citizens that the subsequent federal court action to overturn the state statute, which historically protected the co-ops from competition, is all the authority that's warranted and that no subsequent action should be required in order for a co-op to negotiate interconnection for immediate entry into its territory by a competing carrier. And so I'm here today not to object to the qualifications of VFS as a CLEC. I'm sure it has the managerial, technical, and financial capabilities that are required under the statute. By now Citizens has become accustomed to CLECs controlled or actually Ben Lomand itself competing in its territories, but we do think the public interest is implicated where Ben Lomand is being permitted to expand and to compete in other telecommunications carriers' territories without itself having to be subjected to similar competition in its territory. So the request from Citizens is that the approval of VFS, which is otherwise warranted, would be conditioned on Ben Lomand Cooperative entering into or permitting competition in its territory.¹⁸

At the conclusion of the Hearing, the Hearing Officer directed the parties to submit post-hearing briefs addressing Citizens' request that approval of the *Application* be conditioned upon Ben Lomand's agreement to enter into an interconnection agreement with Citizens.¹⁹

The *Comments of Citizens Telecommunications Company of Tennessee Concerning the Application of Volunteer First Services, Inc. for a Certificate of Convenience and Necessity to Provide Competing Telecommunications Services* ("Citizens' Brief") was filed on March 22, 2004. The *Reply Comments of Volunteer First Services, Inc to Comments of Citizens Telecommunications Company of Tennessee Concerning the Application of Volunteer First Services, Inc for a Certificate of Convenience and Necessity to Provide Competing Telecommunications Services* ("VFS' Brief") was filed on March 29, 2004.

II. Issues Presented for Decision

Whether VFS possesses the necessary qualifications required of an applicant for a CCN as stated in Tenn. Code Ann. § 65-4-201. Whether the public interest component of the Authority's

¹⁸ Transcript of Proceedings, pp 7-8 (March 15, 2004).

¹⁹ *Id.*, pp 13-14 (March 15, 2004)

evaluation of the *Application* permits the Authority to assert jurisdiction over Ben Lomand, a telephone cooperative as defined by Tenn. Code Ann. § 65-29-102, so as to condition approval of the *Application* upon the completion of an interconnection agreement between Citizens and Ben Lomand.

III. Positions of the Parties

A. Citizens

1. Qualifications

Citizens acknowledges that VFS has the requisite managerial, technical and financial capabilities required by Tenn. Code Ann. § 65-4-201.²⁰ Citizens does not object to the certification of VFS on the basis of its qualifications.²¹

2. Public Interest

Citizens states that the Authority should not approve the *Application* unless Ben Lomand agrees to enter an interconnection agreement with Citizens.²² Citizens states that under Tenn. Code Ann. § 65-4-201(a) “the Authority has the duty to review the public interest implications of all applications for licensure.”²³

Citizens emphasizes the pro-competition policy of the Tennessee General Assembly as set forth in Tenn. Code Ann. 65-4-123 which seeks to foster a statewide telecommunications services system by permitting competition in all telecommunications service markets.²⁴ Citizens states that there is no legal prohibition to Citizens’ competing within Ben Lomand’s boundaries and that the TRA has jurisdiction to resolve this issue.²⁵ Citizens’ states that although it desires

²⁰ Transcript of Proceedings, pp 7-8 (March 15, 2004). *See also Citizens’ Brief*, p 1 (March 22, 2004)

²¹ *Citizens’ Brief*, p. 1 (March 22, 2004)

²² Transcript of Proceedings, p 11 (March 15, 2003)

²³ *Citizens’ Brief*, p. 1 (March 22, 2004)

²⁴ *Id.*, pp 1-2

²⁵ *Id.*, p 2

to compete in Ben Lomand's territory, Ben Lomand takes the position that Citizens is statutorily prohibited from competing in Ben Lomand's territory.²⁶ Citizens states that it is currently negotiating an interconnection agreement with Ben Lomand and that Ben Lomand insists that the agreement include provisions subjecting the effectiveness of the agreement to the certification of the TRA or another regulatory body and that Citizens may provide telecommunications services within the geographic territory served by Ben Lomand. Citizens states that there is no legal prohibition to Citizens' competing within Ben Lomand's boundaries and that the TRA has jurisdiction to resolve this issue pursuant to Tenn. Code Ann. § 65-29-130 as a territorial dispute between Citizens and Ben Lomand.²⁷

B. VFS

1. Qualifications

VFS states that it has met the criteria for receiving a CCN under Tenn. Code Ann. § 65-4-201 and that its *Application* should therefore be granted.²⁸

2. Public Interest

VFS states that there is no evidence in the record to support Citizens' recommendation that the certification of VFS be conditioned upon the completion of an interconnection agreement between Citizens and Ben Lomand.²⁹ VFS states that "there are no facts in the record that establish a territorial dispute between Ben Lomand and Citizens" and that the TRA does not otherwise have jurisdiction over Ben Lomand.³⁰ VFS states further that this docket is not the appropriate forum for resolution of a dispute between Ben Lomand and Citizens given that VFS

²⁶ *Citizens' Brief*, p 2 (March 22, 2004)

²⁷ *Id.*, pp 2-3

²⁸ *Id.*, p 5.

²⁹ *Id.*, p. 2.

³⁰ *VFS' Brief*, p 3 (March 29, 2004)

maintains that it is not even a party to any such dispute and that Ben Lomand is not the sole or majority owner of VFS.³¹ VFS states that “there is no evidence in the record as to Ben Lomand’s opinion as to whether Citizens is statutorily prohibited from competing in Ben Lomand’s territory” and that the “issue is not properly before this agency.”³² VFS states further that “an assertion by Citizens’ attorney as to Ben Lomand’s opinion is not a factual basis upon which the Hearing officer can draw a legal conclusion.”³³

IV. Discussion and Analysis

A. Legal Standard for Granting a Certificate of Public Convenience and Necessity

VFS’ *Application* was made pursuant to, and must be considered in light of, the criteria for granting a CCN as set forth in Tenn. Code Ann. § 65-4-201, which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the Authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the Authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if, after examining the evidence presented, the Authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

³¹ *VFS’ Brief*, p 3 (March 29, 2004).

³² *Id*

³³ *Id*

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.³⁴

Pursuant to Tenn. Code Ann. § 65-5-212, a competing telecommunications provider is required to file with the Authority its plan for purchasing goods and services from small and minority-owned telecommunications businesses and to provide information on programs that might provide technical assistance to such businesses.

Citizens has argued that the Authority may exercise jurisdiction over Ben Lomand to resolve a dispute Citizens has with Ben Lomand “relative and concerning” a territorial dispute with Ben Lomand regarding Citizens’ ability to provide telecommunications service in Ben Lomand’s territory.³⁵ The only parties before the Authority in this docket are VFS and Citizens. Citizens ignores the fact that VFS and Ben Lomand are distinct legal entities and argues simply that VFS is Ben Lomand in another form.³⁶ For purposes of its application for a CCN, VFS is a separate corporate entity from Ben Lomand and its *Application* should be judged accordingly. There is no dispute that VFS, a for-profit corporation, is half-owned by Ben Lomand. However, Ben Lomand is specifically excluded from the definition of “public utility” and the jurisdiction of the

³⁴ Notwithstanding the existence of subsection (d), the Federal Communications Commission (“FCC”) has expressly preempted the Authority’s enforcement of subsection (d) pursuant to the authority granted to the FCC under 47 U.S.C. § 253(d) *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion’s Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, (Memorandum Opinion and Order) 14 F.C.R. 11,064 (May 27, 1999), (Memorandum Opinion and Order) 16 F.C.R. 1247 (January 8, 2001). The Authority has since issued an order expanding a competing local exchange carrier’s CCN to provide telecommunications services on a statewide basis including areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. *See In re Application of Level 3 Communications, LLC to Expand its CCN to Provide Facilities-Based Local Exchange and Interexchange Telecommunications Services in all Tennessee Service Areas*, Docket No. 02-00230, *Order Approving Application of Level 3 Communications, L.L.C. to Amend Its Certificate of Public Convenience and Necessity* (June 28, 2002).

³⁵ *Citizens’ Brief*, p. 3 (March 22, 2004).

³⁶ *Id.*, p. 4.

TRA over public utilities pursuant to Tenn. Code Ann. § 65-4-101(a)(5).³⁷ Ben Lomand is within its rights to have an ownership interest in VFS pursuant to Tenn. Code Ann. § 65-29-104 which provides that “a cooperative has the power to . . . become a member in one or more other cooperatives or corporations or own stock therein”³⁸ To the extent that a territorial dispute falling within the jurisdiction of the Authority exists between Citizens and Ben Lomand, Citizens may file a petition with the Authority pursuant to Tenn. Code Ann. § 65-29-130(a) and serve the petition directly upon Ben Lomand. Citizens has not cited, nor has the Hearing Officer found, any legal authority which would allow Citizens to litigate indirectly with Ben Lomand to resolve such a territorial dispute by using the certification proceeding of an entity only partially-owned by Ben Lomand as a forum to resolve such a dispute.

V. Findings of Fact and Conclusions of Law

Based on a review of the pleadings filed in this docket, testimony of witnesses, arguments of counsel, and the record as a whole, the Hearing Officer makes the following findings of fact and conclusions of law:

1. VFS is a corporation originally organized under Tennessee Law on October 20, 1998.
2. The complete street address of VFS’ registered agent is William M. Buchanan, Highway 58 North, Decatur, Tennessee 37322. The complete street address of VFS’ corporate office is 235 O’Brien Drive, Crossville, Tennessee 38557. The telephone number for the corporate office is (931) 484-5097 and the fax number is (931) 484-7605.
3. The *Application* and supporting documentary information existing in the record demonstrate that VFS has the requisite technical and managerial ability to provide competing

³⁷ Tenn. Code Ann. § 65-4-101(a)(5) provides that a “public utility as herein defined shall not be construed to include the following (hereinafter called nonutilities) Any cooperative organization, association or corporation not organized or doing business for profit.”

³⁸ Tenn. Code Ann. § 65-29-104(6)

local exchange telecommunications services within the State of Tennessee. Specifically, VFS' senior management team possesses extensive business, technical, operational experience in the area of telecommunications.

4. VFS has represented that it will adhere to all applicable policies, rules and orders of the Authority.

5. VFS intends to provide local and long distance voice services along with all forms of facilities-based and resold local exchange and interexchange competing resold and facilities-based local exchange telecommunications services, including exchange access telecommunications services in the State of Tennessee.

6. Approval of VFS' *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State of Tennessee and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

7. VFS has filed a satisfactory small and minority-owned telecommunications business participation plan as required by Tenn. Code Ann. § 65-5-212 and Authority rules.

8. VFS has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program as required by Tenn. Code Ann. § 65-5-213.

9. VFS has indicated its awareness of, and its obligation to comply with, the requirements of county-wide calling as set forth in Tenn. Code Ann. § 65-21-114.

10. To the extent a territorial dispute exists between Citizens and Ben Lomand, Ben Lomand is not a party to this docket and the Authority is not required to resolve such a dispute in the context of, and as part of, the public interest considerations undertaken in evaluating whether to

approve VFS' *Application*. In evaluating the public interest considerations of whether to approve VFS' *Application* the Authority is to give predominant consideration to the convenience and necessity of the people of this State and not to an individual applicant or intervenor.³⁹

VI. Conclusion

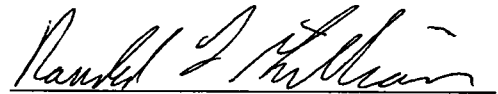
Based on the foregoing the *Application* is approved and VFS is hereby granted a CCN.

IT IS THEREFORE ORDERED THAT:

1. The *Application for Certificate of Public Convenience and Necessity to Provide Competing Telecommunications Services* is approved.

2. Volunteer First Services, Inc. is hereby granted a Certificate of Convenience and Necessity to provide competing local and interexchange telecommunications services within the State of Tennessee including the provision of local and long distance voice services along with all forms of facilities-based and resold local exchange and interexchange competing resold and facilities-based local exchange telecommunications services, including exchange access telecommunications services.

3. Any party aggrieved by the Hearing Officer's decision in this matter may file a petition for reconsideration within fifteen (15) days from and after the date of this Order.


Randal L. Gilliam, Hearing Officer

³⁹ *Blue Ridge Transportation Co et al v Cayce L Pentecost, etc , et al* , 208 Tenn 94, 343 S W 2d 903 (Tenn 1961)